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PTO/SB/21 (04-07)

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## TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

Application Number	10/034,720
Filing Date	December 28, 2001
First Named Inventor	Earl J. Braxton
Art Unit	3751
Examiner Name	Charles E. Phillips
Attorney Docket Number	NMC104A US

### ENCLOSURES (Check all that apply)

- |   |  |  |
|---|--|--|
| <input checked="" type="checkbox"/> Fee Transmittal Form<br><input type="checkbox"/> Fee Attached<br><input type="checkbox"/> Amendment/Reply<br><input type="checkbox"/> After Final<br><input type="checkbox"/> Affidavits/declaration(s)<br><input type="checkbox"/> Extension of Time Request<br><input type="checkbox"/> Express Abandonment Request<br><input type="checkbox"/> Information Disclosure Statement<br><br><input type="checkbox"/> Certified Copy of Priority Document(s)<br><input type="checkbox"/> Reply to Missing Parts/ Incomplete Application<br><input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53 | <input type="checkbox"/> Drawing(s)<br><input type="checkbox"/> Licensing-related Papers<br><br><input type="checkbox"/> Petition<br><input type="checkbox"/> Petition to Convert to a Provisional Application<br><input type="checkbox"/> Power of Attorney, Revocation<br><input type="checkbox"/> Change of Correspondence Address<br><br><input type="checkbox"/> Terminal Disclaimer<br><br><input type="checkbox"/> Request for Refund<br><br><input type="checkbox"/> CD, Number of CD(s) _____<br><input type="checkbox"/> Landscape Table on CD | <input type="checkbox"/> After Allowance Communication to TC<br><input checked="" type="checkbox"/> Appeal Communication to Board of Appeals and Interferences<br><input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief)<br><input type="checkbox"/> Proprietary Information<br><input type="checkbox"/> Status Letter<br><input checked="" type="checkbox"/> Other Enclosure(s) (please identify below):<br>Postcard |
|---|--|--|

Remarks

### SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	VanOphem & VanOphem, P.C.		
Signature			
Printed name	Remy J. VanOphem		
Date	May 29, 2007	Reg. No.	27053

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I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Signature			
Typed or printed name	Remy J. VanOphem	Date	May 29, 2007

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PTO/SB/17 (02-07)

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Effective on 12/08/2004.

Enacted pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

# FEE TRANSMITTAL

## For FY 2007

☒ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$) 0

**Complete if Known**

Application Number	10/034,720
Filing Date	December 28, 2001
First Named Inventor	Earl J. Braxton
Examiner Name	Charles E. Phillips
Art Unit	3751
Attorney Docket No.	NMC104A YS

**METHOD OF PAYMENT** (check all that apply)☐ Check ☐ Credit Card ☐ Money Order ☒ None ☐ Other (please identify): \_\_\_\_\_☒ Deposit Account Deposit Account Number: 22-0212 Deposit Account Name: VanOphem & VanOphem, P.C.

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☐ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, except for the filing fee☒ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☒ Credit any overpayments

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**FEE CALCULATION****1. BASIC FILING, SEARCH, AND EXAMINATION FEES**

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	0
Design	200	100	100	50	130	65	0
Plant	200	100	300	150	160	80	0
Reissue	300	150	500	250	600	300	0
Provisional	200	100	0	0	0	0	0

**2. EXCESS CLAIM FEES**

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180
<b>Total Claims</b>	<b>Extra Claims</b>	<b>Fee (\$)</b>
- 20 or HP =	x	= 0
HP = highest number of total claims paid for, if greater than 20.		
<b>Indep. Claims</b>	<b>Extra Claims</b>	<b>Fee (\$)</b>
- 3 or HP =	x	= 0
HP = highest number of independent claims paid for, if greater than 3.		

**3. APPLICATION SIZE FEE**

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
- 100 =	/ 50 =	(round up to a whole number) x	=	0

**4. OTHER FEE(S)**

Non-English Specification, \$130 fee (no small entity discount)

Other (e.g., late filing surcharge):

Fees Paid (\$)

0

0

**SUBMITTED BY**

Signature

Registration No. 27053  
(Attorney/Agent)

Telephone (586) 739-7445

Name (Print/Type) Remy J. VanOphem

Date May 29, 2007

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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PATENT APPLICATION  
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Serial No.: 10/034,720  
Appeal No.: 2007-14521  
Appellant: Earl J. Braxton  
Filing Date: December 28, 2001  
Title: Portable Toilet Shelter Having Improved Stackability  
  
Art Unit: 3751  
Examiner: Charles E. Phillips  
  
Attorney Docket: NMC104A US

**Request for Rehearing under 37 C.F.R. § 41.52**

Mail Stop Appeal Brief-Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

Appellant respectfully requests from the Board of Patent Appeals and Interferences (Board), a rehearing and reconsideration of the Board's affirmance of the Examiner's final rejection of Claims 1-3, 5, 7, 8, 10, 12, 13, 15, 17, and 21 in the present appeal proceeding. Appellant acknowledges receipt of the decision of the Board mailed on March 28, 2007. By this request, Appellant desires to avoid a mere re-argument of Appellant's position on appeal and desires to narrow and simplify Appellant's arguments to facilitate the Board's reversal of the rejections. Therefore, Appellant herein states with particularity only the points of law and facts believed to have been misapprehended or overlooked in rendering the decision. Nonetheless,

Appellant hereby incorporates, by reference, the arguments previously submitted in Appellant's main brief on appeal filed April 10, 2006.

Appellant notes that the Board sustained the Examiner's final rejection of Appellant's Claims 1-3, 5, 7, 8, 10, 12, 13, 15, 17, and 21. The only other claims in the application are Claims 4, 9, 14 and 18-20 which were withdrawn from consideration as drawn to a non-elected subject matter.

Appellant asserts that Claims 1-3, 5, 7, 8, 10, 12, 13, 15, 17, and 21 are not an obvious improvement over the teachings of Dahl, U.S. Patent No. 2,820,256 in view of the further teachings of Tegg et al., U.S. Patent No. 4,744,111. Appellant respectfully asserts that the Board has erroneously mischaracterized the language in the body of Appellant's independent claims on appeal and misapprehended a point of law regarding a precise structure in the relationships of the mechanical elements disclosed and teachings thereof as set forth in Appellant's application.

Appellant recognizes, as set forth in the appeal decision that obviousness is to be determined in terms of the level of skill of a person having ordinary skill in the art at the time the invention was made. 35 U.S.C. § 103; *Graham v. John Deere Co.*, 383 US1, 17-18, 148 USPQ 459, 467 (1966).

Accordingly, to establish a prima facie case of obviousness, the Patent Office must: (1) set forth the differences in the claim over the applied references; (2) set forth the proposed modification of the references which would be necessary to arrive at the claimed subject matter; and (3) explain why the proposed modifications would be obvious. To satisfy step (3) above, the Patent Office must identify where the prior art provides a motivating suggestion, inference, or

implication to make the modifications proposed in step (2) above. *In re Jones*, 21 USPQ2d 1941(Fed. Cir. 1992).

Specifically, Appellant requests reconsideration of the decision by the Board as found on page 4, that

“We recognize that Claim 1 asserts that the stackable folded planar state is “for transporting said portable toilet shelter.” In our opinion, this language is directed at the intended use of the folded shelter and therefore shall not constitute a limitation on the claimed shelter.”

Frankly, Appellant is quite surprised at this opinion for the simple reason that such opinion is well known to the Appellant if the language of the intended use is present in the preamble of the claim. However, the specific neglected functional language here is found in the body of each of Appellant’s independent claims. Specifically, the language can be found at line 21 of Claim 1 set forth on page 2 of the Board’s decision.

Appellant considers the decision to not recognize specific functional words in the claim to be clear legal error, in that, it has long been the rule that “while not an absolute rule, all claim terms are presumed to have meaning in a claim” *NTP, Inc. v. Research in Motion, Ltd.*, 75 PQ2d 1763-1797, 1776, (Fed. Circuit) 2005. If functional language in a preamble of a claim has been determined to breathe life and meaning into a claim, making it a limitation of a claim, see *In Re Paulson*, 30 F3rd 1475, 1479, 31 USPQ 1671, 1673 Fed Circuit (1994), then functional language appearing in the body of a claim must also give meaning and life to the claim to properly define limitations of the invention. Accordingly, for the Board to conclude that “for transporting said

portable toilet shelter” is directed at the intended use of the folded shelter and therefore does not constitute a limitation on the claimed shelter is a clear legal error in that all claim terms are presumed to have meaning in a claim. See *NTP, Inc. supra*.

This limitation of the claim is an important characteristic of the invention, in fact a fundamental characteristic of the invention when viewed in terms of the problems defined in the application in the background and history thereof. In fact, the primary objective of the invention is to provide a more stackable toilet shelter compared to those of the prior art recited in the background of the invention and in fact the objective provides a measure of the advantages in transporting their portable toilet pointing out very succinctly that on a standard 53 foot long semi-truck trailer, approximately 150 portable toilet shelters of the present invention can be shipped as compared to fully assembled toilet shelters of which only one-eighth as many can be shipped and further compared to the Appellant’s earlier U.S. Patent No. 4,493,118 wherein only one-half of the toilets disclosed therein could be shipped on the same size semi-trailer. Therefore, for the Board to conclude that they will neglect this language in the reading of the body of the claim is clear legal error since all claim terms are presumed to have meaning in a claim. If the Board properly considers these functional limitations in the body of Appellant’s independent claims, the basis for this is made very clear in the specification so that a person of ordinary skill in the art clearly understands that the limitations set forth in the independent claims provide the various significant advantages itemized in the specification in the application.

It is obvious that the Board completely neglected this fundamental characteristic of the invention and necessary limitation of the independent claims in order to justify its conclusion

that independent Claim 1 is obvious in view of the teachings of Dahl. Frankly, if a person of ordinary skill in the art would look at the language of Dahl in column 4, beginning at line 13, he would learn therefrom that the objectives of the Dahl invention are obtained by performing three steps in order to meet the objectives of Dahl that is, to provide a temporary privy on a construction job or at a camping spot, or to serve as a portable dressing room for bathers. At column 1, Dahl specifically provides as follows:

“The preferred practice of the invention is characterized by the fact that all of the eight sections are permanently connected together in such manner as to permit the sections either to be stacked for transportation or to be unfolded for erection of the enclosure.”

Accordingly, the steps to be followed to accomplish this objective is set forth at column 4, lines 12-38 as follows:

“The first step in folding the erected structure for transportation from one site to another is to remove the diagonal brace member 70 and to fold the left wall L against the back wall B and the front wall F against the right side wall R thereby collapsing the closure to the flat state shown in Figure 2. This flat state may be described as comprising two interconnected stacks of two each of the four side walls of the enclosure.

The next step is to fold the arrangement shown in Figure 2 downward back on itself to form the arrangement shown in Figure 3 which comprises two interconnected stacks of four each of the eight wall sections of the enclosure. The final step is to fold the arrangement shown in Figure 3 on itself with the hinge strip 40 outermost, thereby forming a stack of eight of the wall sections. The two wall sections 26 and 30 are at opposite ends of the stack and these two sections are interconnected by the web 55 of the double hinge strip 40. It is apparent that in this final folded state of the structure the double hinge strip 40 unifies the stack since it cooperates with the wall sections 26 and 30 to enclose the remaining six wall sections. It is to be noted that all of the wall sections of the eight section stack are interconnected directly and indirectly in a manner that tends to keep each of the wall sections in place in the stack.”

From this suggested teachings of practicing the Dahl invention, no person skilled in the art, after reading Dahl and its teachings that a three step process is necessary to provide a transportable arrangement of the toilet, in order to be carried by a passenger automobile, will be motivated to attempt to, after the practicing the first step of Dahl load the large structure into an automobile in order to transport the shelter to be used as a temporary privy on a construction job or at a camping spot or to serve as a portable dressing room for bathers as set forth in Dahl's objectives. Clearly, even if you presume that a person having ordinary skill in the art would exercise common sense and sound judgment, such person would not attempt to take a structure which is approximately eight foot by eight foot and attempt to load this into a automobile for transportation purposes. Accordingly, for the Board to conclude that they are going to neglect the fundamental characteristics of the invention as set forth by the function phrase in the body of claim, especially in view of its supporting specification wherein the problem has been clearly set forth and objective makes it clear that the whole purpose of providing this type of an enclosure is to enable a significant cost advantage in transporting these portable shelters long distances, is absolutely incorrect based not only on the clear unambiguous claim language of the independent claims but also the disclosure itself when viewed by a person of ordinarily skilled in the art.

In addition to the above misapprehended point by the Board, two additional questions of fact must be brought to the attention of the Board concerning its findings.

At page 4 of the decision, the Board states as follows:



“We additionally note that the claim does not require the shelter to be in a partially disassembled or partially erect state; the claim reads on a loop enclosure in any state.”

Further at page 9 of the decision, the Board again repeats itself and states:

“Finally, we note that the claim does not require that it be in the partially-disassembled state; only that it be capable of being folded into a partially-disassembled state.”

Appellant does not understand how the Board can possibly make this finding since when viewing Claim 1 as appearing on pages 1-2 of the decision, line 15 on page 2 clearly states as follows:

**“Said portable toilet shelter being in a partially disassembled folded state when said loop enclosure is collapsed,** wherein one each of said opposed planar end walls is in direct contact with at least a portion of a respective one of said planar sidewalls, said loop enclosure being collapsible to a stackable folded planar state having a thickness one each of said planar end walls and one each of planar side walls...”

Accordingly, this fundamental characteristic appearing in the body of the claim, based on the same legal precedent set forth above, is presumed to have meaning in a claim. It is therefore not understood how the Board can conclude that the “claim does not require the shelter to be in partially disassembled or partially erected state...” when the clear unambiguous language in line

15 of independent Claim 1 on page 2 of the opinion, recites the specific limitation in the body of the claim.

Further, with respect to the issue concerning latch 60 beginning at the bottom of page 9 of the Board's decision, the Board has concluded that the latch to which the Appellant refers is only applicable when the walls are not connected by hinges, e.g., an alternative embodiment of Dahl's disclosure. However, in viewing Figures 5 and 6 and as identified in the brief description of the drawings, and set forth in column 1, Figure 5 is a perspective view from the rear of the erected enclosure; and

Figure 6 is a plan view of the erected enclosure;

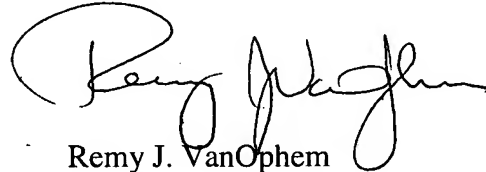
If as the Board concludes this is an alternative embodiment, it is clear that the embodiment shown in both Figures 5 and 6 are identical to the embodiment shown in Figures 1-4. Note in Figure 6 that three of the corners have hinges 34, 35, and 42 while a fourth corner is identified as having a web 55 of substantial width between the two corresponding wall sections 26 and 30. Note that Figure 1 also shows the web 55 between corresponding wall sections 26 and 30 while the other three corners have a hinge namely, 34, 35, or 42. Accordingly, the embodiment shown in Figures 5 and 6 are clearly not an alternate embodiment referred to by the inventor as well as the Board, but indeed shows the latch 60 used on the two walls having the web 55 therebetween. Accordingly, the Board's conclusion that the latches 60 are only shown in an alternate embodiment that is, one not being connected by hinges is completely contrary to the disclosure as clearly shown in the reference of Dahl specifically, Figures 1-6. Accordingly, since the latch 60 is disclosed to be used in such cases where a web 55 is used as clearly shown in

Figures 1-6, I believe the argument set forth in Appellant's brief on page 8 does indeed specifically apply because such latch is not only used on an alternative embodiment as alleged (and apparently not shown) by the Board but indeed on the preferred embodiment as clearly shown in Figures 1-6.

Accordingly, it is respectfully requested that for the reasons set forth above, that this honorable Board reconsider its position with respect to the rejection of Claims 1-3, 5, 7, 8, 10, 12, 13, 15, 17, and 21 as being obvious over the teachings of Dahl and Tegg et al.

Respectfully submitted,

VANOPHEM & VANOPHEM, P.C.



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Date: May 29, 2007



Remy J. VanOphem, Reg. No. 27053